BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEARLINE GREEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,004,157
U.S.D. 259	)	
Respondent	)	
Self-Insured	)	
	)	

ORDER

Respondent requests review of the January 28, 2004 Award entered by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on July 13, 2004 .

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for claimant. Gary K. Albin of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

An accidental fall sustained on March 8, 2002 while claimant was in the process of retrieving a handicapped child who had wandered from a field trip forms the basis of the current claim.

The ALJ found claimant's average weekly wage to be $143.95, that claimant was entitled to compensation based upon a permanent and total disability and denied the Social Security offset sought by respondent.

Respondent argues that claimant is a "part-time hourly employee."[1] And because claimant voluntarily opted not to accept teaching assignments for six out of 25-weeks preceding the date of her accident respondent argues her average weekly wage should be determined by dividing her gross wages of $2,735.13 by all 25 weeks that claimant could have worked, not by just the nineteen (19) weeks she actually worked as the ALJ did.[2] Respondent also argues claimant is not permanently and totally disabled. And respondent contends that claimant has not made a good faith effort to secure employment and should have a post injury wage imputed to her.

Apparently claimant has been receiving Social Security retirement benefits since 1992, prior to claimant taking this job with respondent. Although the issue of Social Security offset was not raised as an issue at the regular hearing held on July 30, 2003, respondent did argue in its submission brief to the ALJ that it should be entitled to a Social Security offset pursuant to K.S.A. 44-501(h). However, there is nothing in the record to reflect how much claimant is receiving in Social Security retirements benefits. The ALJ determined that respondent would not be entitled to the offset because claimant had been receiving Social Security retirement benefits before she accepted the new job with respondent. "[T]herefore, the Social Security is not a wage replacement in this matter."[3]

Claimant contends that she has a 30 percent whole person functional impairment and that out of all the evidence and testimony of all the doctors she has seen, the only doctor whose evaluation reflects all elements of her injury is that of Philip R. Mills, M.D., and therefore the Board should adopt his evaluation and opinion. Moreover, claimant argues that she is realistically unemployable as a result of her accident and injuries and, therefore, is entitled to an award based upon a permanent total disability. Claimant argues that the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the time of the work-related accident, claimant was 72 years old and was a substitute teacher employed by the public school system in Wichita, Kansas. Claimant worked as a full time elementary teacher at U.S.D. 259 between 1966 and 1990. She started working as a substitute teacher for respondent during the 1995-1996 school year.

Claimant testified that on March 8, 2002, while on a field trip with a group of handicapped children, two of the children wandered away. One of the children came back but claimant went to retrieve the other child and upon returning, she did not realize there were stairs and she stumbled and fell down.

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[1] K.S.A. 44-511(a)(4).

[2] *See* K.S.A. 44-511(b)(4) and (5).

[3] Award at 4 (Jan. 28, 2004).

As a result of the accident claimant injured her right shoulder, right arm, right hand, right knee and her lower back. Claimant testified at the July 30, 2003 regular hearing that she is having problems with her left knee hurting and her "back hurts severely."[4] She also testified that she wakes up every night with "pains in her right knee"[5] and has "difficulty getting up and down, and cannot walk very far."[6]

She first sought medical care at Wichita Clinic Immediate Care, and was seen by Daniel Lygrisse, M.D. Dr. Lygrisse performed a physical and reviewed x-rays. Dr. Lygrisse found an abraded excoriated area on the anterior aspect of the right knee with pain on weight bearing. The x-rays of the right knee, right wrist and right arm revealed no abnormalities. His conclusion was claimant had a contusion of the right knee, right elbow, right forearm and right wrist. He referred her for physical therapy at NovaCare for six (6) weeks and gave her medications and placed her on light duty restrictions.

When Dr. Lygrisse saw claimant again on March 22, 2002, he believed claimant was improving. However, when Dr. Lygrisse reevaluated claimant on March 29, 2002, claimant stated her knee problem persisted and Dr. Lygrisse thought claimant should have a orthopedic consult and referred her to Dr. Jannson.

Claimant saw Kenneth A. Jannson, M.D., on April 15, 2002. Dr. Jannson is an orthopedic surgeon. He reviewed claimant's x-rays. He believed claimant to have an underlying severe degenerative arthrosis of the knees bilaterally but believed only the right knee problem was exacerbated by a work injury. He referred claimant to John R. Schurman, II, M.D. Dr. Schurman and Dr. Jannson are in practice together.

Claimant saw John R. Schurman, II, M.D., for the first time on April 16, 2002. Dr. Shurman was the court-ordered authorized treating physician for claimant's knees.[7] Dr. Schurman is board certified in orthopedic surgery with his specialty in joint replacement surgery but focuses mainly on the hips and knees. [8] At that time claimant had complaints of right sided knee pain. Dr. Schurman testified he obtained claimant's history, reviewed x-rays and performed a physical. Claimant's x-rays revealed she had osteoarthritis. He believed claimant needed bilateral knee replacements but felt only the right knee problem was work-related. Dr. Schurman performed a right total knee arthroplasty on August 22, 2002.

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[4] R.H. Trans. at 11.

[5] *Id.* at 12

[6] *Id.*

[7] Order (July 23, 2002).

[8] Schurman Depo. at 5.

Claimant eventually was seen by John P. Estivo, D.O., on August 14, 2002. Dr. Estivo was the court-ordered authorized treating physician for claimant's hips, low back, right arm, hand and shoulder.[9] He is board certified as an orthopedic surgeon. Dr. Estivo testified that after taking claimant's history, reviewing her x-rays and performing a physical he determined that claimant suffered from cervicalgia with radiculopathy, right shoulder pain, possible ulnar nerve entrapment to the right upper extremity, and lumber spine strain. Dr. Estivo ordered an EMG and NCT studies, which reflected carpal tunnel syndrome and polyneuropathies.

Claimant saw Blake C. Veenis, M.D., on August 20, 2002 for nerve conduction studies and EMGs of the right and left upper extremities for symptoms which claimant related to the fall she sustained on March 8, 2002. The studies revealed claimant had sensory motor peripheral polyneuropathy, bilateral carpal tunnel syndrome and mild right ulnar nerve compressive neuropathy at the elbow. Dr. Veenis did not find any signs of radiculopathy or plexopathy.

Dr. Estivo followed up with claimant on September 16, 2002. The MRI revealed her cervical spine had some degenerative changes but no abnormalities. The MRI of the right shoulder revealed a rotator cuff tear. Dr. Estivo diagnosed claimant with bilateral carpal tunnel syndrome at the wrists which were asymptomatic at that time. He also diagnosed claimant having a mild ulnar nerve entrapment to the right elbow which appeared to be mildly asymptomatic. Claimant was found to have a rotator cuff tear of the right shoulder and was also diagnosed with a cervical spine strain. He recommended she be placed in physical therapy for her cervical spine, right shoulder and lumbar spine discomfort. He treated her with steroid injections and local anesthetic.

Dr. Schurman saw claimant again on October 4, 2002 for a six-week followup visit. At that time claimant reported she was doing well and Dr. Schurman allowed claimant to drive and continued her on the restrictions imposed by Dr. Estivo.

Claimant next saw Dr. Estivo on October 16, 2002. At that time claimant had been in physical therapy but was having right shoulder pain. In addition, Dr. Estivo again diagnosed claimant with cervical spine strain. Dr. Estivo also noted the lumbar spine had some slight tenderness but there was no muscle wasting to the lower extremities. He recommended claimant continue with physical therapy and gave claimant a second injection to the right shoulder. He imposed restrictions of no lifting more than 20 pounds and no overhead use of her right arm. Dr. Estivo advised claimant to limit her bending, twisting and stooping to no more than one-third of a full workday.

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[9] Order (July 23, 2002) and Estivo Depo. at 14.

Dr. Estivo saw claimant on November 18, 2002 for a followup visit. Claimant reported the injections helped her and her only complaint on that day was lumbar spine strain. She denied any pain radiating into the lower extremities. Dr. Estivo performed a physical that day and his impression was rotator cuff tear to the right shoulder that was asymptomatic, cervical spine strain that was resolving and bilateral carpal tunnel syndrome that was asymptomatic and lumbar spine pain. He recommended a MRI of the lumbar spine be completed.

Dr. Estivo next saw claimant on November 26, 2002. Claimant's MRI of the lumbar spine revealed some degenerative changes. There was also degenerative grade one spondylolisthesis at L4-L5 with some spinal stenosis at L4-L5. Dr. Estivo felt these were more age-related changes.[10] He performed another physical and believed claimant was suffering from lumbar spine strain with degenerative joint disease and spinal stenosis that preexisted the March 2002 accident. He felt she was suffering from cervical spine strain that appeared to be resolving and right shoulder rotator cuff tear which he believed preexisted her fall since it is not uncommon at her age to have rotator cuff degeneration. Dr. Estivo also testified that she was suffering from carpal tunnel syndrome bilaterally. Neither the rotator cuff condition nor the carpel tunnel syndrome were symptomatic at the time of his November 26, 2002 examination. He believed claimant at that time to be at maximum medical improvement and provided a rating of five (5) percent based on the *Guides*, Category II.[11] Excluding the knee, Dr. Estivo testified he did not believe claimant suffered any rateable permanent impairments other than for the lumbar spine strain. He provided her with permanent restrictions of no lifting more than 35 pounds and to limit her bending, twisting, and stooping to no more than one-third of a full workday. At that time Dr. Estivo released her from his care. Using the tasks list prepared by Steve Benjamin, Dr. Estivo testified that of the 19 tasks defined, claimant was capable of doing 17 of those for a 10.5 percent task loss based on these restrictions.

Claimant saw Dr. Schurman for the last time December 11, 2002. At that time Dr. Schurman recommended restrictions but indicated that these limitations were largely to prolong the service life of the device that he installed in her knee and not restrictions regarding her normal daily living activities. He recommended permanent restrictions of no lifting of 50 pounds, no repetitive lifting of 25 pounds, no kneeling and limited squatting. At the December 2002 visit Dr. Schurman did not feel claimant had reached her maximum medical improvement and, therefore, did not provide a impairment rating for claimant. Using the task list provided by Steven Benjamin, Dr. Schurman testified that claimant should be allowed to perform those tasks under his restrictions and his restrictions only.

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[10] Estivo Depo. at 8.

[11] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was examined by Philip R. Mills, M.D., on March 5, 2003, at her attorney's request. Dr. Mills is board certified in physical medicine and as a independent medical examiner. Dr. Mills opined that based on claimant's history, his review of the medical records and his examination of claimant, that there is a causal relationship between the fall she sustained on March 8, 2002, and claimant's complaints of wrist and shoulder pain, right knee pain, and back pain. Based on the *Guides* he opined that claimant was at maximum medical improvement and gave her a 20 percent permanent impairment to the body as a whole for her total right knee replacement. For the loss of range of motion of her wrist she would have a four (4) percent permanent partial impairment to the right upper extremity. For loss of range of motion to the shoulder she would have a ten (10) percent permanent partial impairment to the right upper extremity. Using the Combined Values Chart he opined claimant has a 14 percent permanent partial impairment to the right upper extremity which is an eight (8) percent permanent partial impairment to the whole body. Like Dr. Estivo, he rated claimant's low back condition as a DRE Lumbrosacral Category II impairment which is a five (5) percent permanent partial impairment to the body as a whole for the lumbar spine sprain. Combining these ratings using the Combined Values Charts in the *Guides*, claimant has a 30 percent permanent partial impairment to the body as a whole. He also said claimant should perform sedentary work only, that she is unable to climb stairs, and she should do no walking. He also recommended a handicapped parking sticker. Dr. Mills testified using the task list provided by Jerry Hardin that claimant has lost the ability to perform 11 out of 15 tasks for a 73.33 percent task loss. Taking into consideration a realistic assessment of the claimant's age, training, background, and severely compromised capabilities with regard to the task list, Dr. Mills opined that, in his view, she is essentially unemployable.

At the request of claimant's attorney she was interviewed on June 16, 2003, by Jerry Hardin a human resource consultant for the purpose of developing a job task list based on a 15-year work history and to determine her post-accident wage earning ability. Mr. Hardin determined claimant "is unable to obtain or perform substantial, gainful employment and should be on social security."[12] Mr. Hardin testified, "I just can't see the school system hiring her back for [sic] even on a substitute basis. And I don't know of any other jobs in the open labor market that I would recommend her to do, that she could [do] with the restrictions she has."[13]

At the request of respondent's attorney claimant was seen by Steve Benjamin on September 3, 2003, for a vocational assessment report based on a 15-year work history. Mr. Benjamin is a part-time vocational rehabilitation consultant at CorVel. Although his opinions are not competent evidence of task loss, Mr. Benjamin suggested that based on Dr. Estivo's permanent work restrictions claimant could not do three (3) prior work tasks

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[12] Hardin Depo., Ex. 3.

[13] *Id.* at 28.

resulting in a 15.8 percent task loss and using Dr. Schurman's permanent work restrictions she would lose three (3) prior work tasks which results in a 15.8 percent task loss. He also testified that based upon Dr. Mills' permanent work restrictions he believe there would be a loss of nine prior work tasks which results in a 47.4 percent task loss. As claimant is not working she has a 100 percent wage loss but Mr. Benjamin believes claimant to be capable of working in the open labor market in an educational administrative type position which could result in an average weekly wage of $941.40 per week. This would result in claimant having no wage loss.

Although claimant testified at the regular hearing that she applied for continuing substitute work with the school district she also testified she would be physically unable to do such work at this time as she continues to have problems with her arm, back and legs from the fall. There is nothing in the record to indicate that respondent offered her either an accommodated position or another position.

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[14] and *Copeland*.[15] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the

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[14] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 *rev. denied* 257 Kan. 1091 (1995).

[15] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[16]

Claimant has not worked since working for U.S.D. 259. She has applied for substitute teacher jobs but does not believe she is physically capable of working. Dr. Mills agreed.

> Q. (Mr. Wilson) I want you to listen to this for just a moment, Doctor, Pearline Green is 72 years old, she'll be 73 here in the next month or so, she is a teacher, has been a teacher for some many years, has a Master's degree, plus 60 hours, I believe she testified to, and obtained that in approximately 1969. She continued to teach into approximately 1990 as a full-time teacher, and then in the 1995-96 school year, began performing services as a substitute teacher. This is a lady who is diagnosed with diabetes as far back as approximately 1988, she's had open heart surgery, I believe, in the year 2000, that she continued to work despite the diabetes and the open heart surgery, she continued to work as a substitute teacher until the incident where she fell working for USD 259 on or about March 8th of 2002. Do you have an opinion based upon your restrictions and based upon the injury that befell her and an opinion based upon a reasonable degree of medical probability whether or not she is essentially and realistically unemployable as a result of that injury which befell her?[17]
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> . . . .
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> A. (Dr. Mills) Well, in light of the description of the age, the multiple medical problems, the injury, the patient's training, background, the task list, she is essentially and realistically unemployable in my view.
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> . . . .
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> Q. Now, Doctor, I know we don't have a crystal ball as we sit here today, but we know that Pearline has a history of diabetes, as well as open heart surgery. We also know that she continued to work after the year 2000 when she had the open heart surgery, she continued to work as a substitute teacher. Barring this incident, do you have any reason to believe that she wouldn't be able to continue - - to have continued working?
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> A. No, this is the straw that put her over the line.[18]

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[16] *Id.* at 320.

[17] Mills Depo. at 25 and 26.

[18] *Id.* at 27.

. . . .

> Q. Since your restrictions specifically say no walking, do you have an opinion within a reasonable degree of medical probability whether or not a wheelchair would be a feasible alternative to mobility as it relates to gainful employment in a teaching setting?
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> A. In a 72 year old, realistically, no. If she was younger, what we find, let's say in a paraplegic, if they are younger, then we can get them independent. At age 72, with neurologic and other problems which she had, we cannot get them independent in a wheelchair. They develop problems with their shoulders from pushing the wheelchair, you just can't - - I mean there is just too many fronts that you are dealing with, they have difficulty in transfers, and you can - - you can help them, but it's difficult to get them employable at age 72 with a wheelchair if they have not ever used a wheelchair before.[19]

K.S.A. 44-510c(a)(2) defines permanent total disability as follows: "[p]ermanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment." The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*,[20] held that "[t]he trial court's finding that *Wardlow* is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent." The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[21]

> The only physician able to provide a complete rating and analysis of the [c]laimant's condition was that of Dr. Mills. The other physicians were only able to rate and relate a portion of her medical condition related to her fall. The question before the [c]ourt concerning disability is whether or not the [c]laimant is permanently and totally disabled or whether or not she should receive a work disability. It could be argued that [c]laimant still has a life force enabling her to find a job, but in the real world, there are no employers lined up to hire this individual. Although the age and preexisting medical condition of this individual would more than likely have forced her to quit working at some point in the near future, the [c]ourt must agree with Dr. Mills that this event precipitated making her realistically unemployable. The [c]ourt will, therefore, find the [c]laimant has a permanent and total disability.[22]

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[19] *Id.* at 28 and 29.

[20] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

[21] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[22] Award at 4 (Jan. 28, 2004).

The Board agrees with the ALJ's analysis and findings. Considering claimant's ongoing complaints of pain, Dr. Mill's testimony regarding claimant's abilities and restrictions, and Mr. Hardin's and Mr. Benjamin's assessments of claimant's potential labor markets, the Board likewise concludes the evidence taken as a whole supports a finding that claimant is permanently and totally disabled from engaging in substantial gainful employment. Consequently, the Board affirms the ALJ's conclusion that claimant is essentially unemployable and entitled to receive permanent total disability compensation.

The Board also affirms the ALJ's conclusion that claimant's social security retirement benefits should not reduce claimant's workers compensation benefit payment.

K.S.A. 44-501(h) provides:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

In *Dickens*,[23] the Kansas Supreme Court interpreted that statute and held that workers compensation benefits should not be reduced by social security retirement benefits when the worker was receiving those benefits at the time of the accident. The Kansas Supreme Court reasoned that the purpose of the statute was to prevent wage loss duplication and there is no wage loss duplication when a worker is injured who began receiving social security retirement benefits before his or her work-related accident.[24]

As claimant began receiving social security retirement benefits before she returned to work with respondent, her returning to work created a second source of income. Accordingly, compensating claimant for her work-related injury does not duplicate her wage loss. The Board concludes that respondent is not entitled to a social security retirement credit or offset under K.S.A. 44-501(h).

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[23] *Dickens v. Pizza Company, Inc.*, 266 Kan. 1066, 974 P.2d 601 (1999).

[24] *See also McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 91 P.3d 545, *rev. denied* ____ Kan. ____ (2004).

Finally, the Board also agrees with the ALJ's calculation of claimant's average weekly wage. Only those weeks where work was available and claimant did in fact work should be considered. Therefore, the ALJ was correct to divide claimant's total gross earnings by the 19 weeks she actually worked rather than the 25 calendar weeks she was employed as a part time worker.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Jon L. Frobish dated January 28, 2004 is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Gary K. Albin, Attorney for Respondent
Administrative Law Judge, Wichita Office
Paula S. Greathouse, Workers Compensation Director